No. 10965

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MABEL HELEN LOWERY,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

## Brief of Appellant

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TRICK & MURRAY, SEATTLE, STATIONERS, PRINTERS.

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### STATEMENT OF THE CASE

This is an appeal from a judgment of conviction and sentence to imprisonment entered in the United States District Court for the Western District of Washington, Northern Division (Tr. p. 10).

### FACTS OF THE CASE

Appellant was indicted in five counts. Counts I and II charged sale of certain Smoking Opium. Counts III and IV charged possession. Count V charged concealment, possession and transportation in violation of the Act of February 9, 1909 (St. p. 2-6).

Appellant was convicted of Count IV only and was sentenced to serve a term of eighteen months in the Federal Reformatory for women at Alderson, West Virginia (St. 10-11).

Appellant gave notice of appeal (St. 11). The judgment and sentence was dated January 3, 1945, and the notice of appeal was given the same day (St. p. 12). Prior to sentence defendant's motion for new trial and motion in arrest of judgment were denied (St. p. 8-9). The bill of exceptions was regularly certified on the 19th day of February, 1945 (St. p. 67).

## STATEMENT OF JURISDICTION

This court has jurisdiction of any appeal from a final judgment in a criminal case by virtue of the rules of procedure of the Supreme Court of the United States authorized by the Act of Congress approved March 8, 1934.

O'Brien Federal App. Procedure, 3rd Edition, p. 89.

## ASSIGNMENT OF ERROR (St. 47)

The error assigned and relied upon by this appeal is:

> "1: The court erred in denying the challenge to the sufficiency of the evidence and motion for a directed verdict made at the conclusion of the government's case, and at the end of all evidence as to counts 3, 4 and 5."

## QUESTION INVOLVED

If the evidence shows that a defendant is addicted to the use of narcotics and has been arrested under facts proving as a matter of law that Federal Officers had illegally entrapped the addict into committing an offense, can such addict then be convicted because of a small quantity of narcotic drug taken from her purse at the time of such illegal arrest?

## STATEMENT OF FACTS INVOLVED

The evidence in this case shows that on May 5, 1944, certain Federal officers, charged with the duty of enforcing the laws against traffiic in narcotics, without payment of proper tax, arrested a Chinese whose name was Mar Gin Wing (St. 18). This Chinese was at the time unlawfully in possession of a jar of smoking opium. He was taken to the Federal Court House in the City of Seattle and immediately before entry to the building was searched and the opium found (St. 19). After this search and seizure of the narcotics defendant was questioned. He was held on the third floor of the Federal Court House which happened to be the offices of the Narcotics Division. He claimed to the officers that he had previously had an understanding with one of his customers, Mabel Lowery, in which he agreed to sell her narcotics (St. 18-29). The officers then loaned him a government automobile and gave him the narcotics for the purpose of seeing if he could persuade the appellant to purchase. The witness testified that he knew and told the officers that Mabel Lowery was addicted to the use of smoking opium. He testified he had been selling narcotics for two years (St. 21). The Supervisor of the Narcotics Division testified that he knew Mabel Lowery was an addict but that at the last time he saw her "she looked to me like she might be at least temporarily abstaining" (St. 29). He also testified that he was in charge of the office and approved the arrangement whereby seized narcotics were sent in a Federal automobile for the purpose of trying to persuade an addict to purchase them in order to make the arrest (St. 29). All the other narcotic officers also testified to the same situation. Appellant was charged in Counts 3 and 5 (St. 4-5) with offenses growing out of this purchase.

The evidence showed that the Federal officers stopped the automobile with the Chinese and the appellant both in the front seat and found the narcotics upon the front seat of the automobile. The Chinese witness testified that he had not completed the sale and had not been paid for the narcotics at the time of the arrest (St. 20).

The appellant was in this position before the lower court: Unless the lower court ruled, *as a matter of law,* that appellant's arrest was entrapment then there were no grounds for challenging the legality of the search of her purse. The appellant was convicted *only* of Count 4. As to Count 4, the Government succeeded in the search of appellant's pocketbook in finding a minute quantity (sufficient to analyze) of smoking opium. Appellant at the end of the government case requested the court to direct a verdict as to Counts 3 and 5 on the ground that the evidence showed entrapment *as a matter of law* (St. 38-45). Appellant also challenged the sufficiency of the evidence as to all counts both at the end of the government case and at the end of the entire case (St. 45). Appellant moved in arrest of judgment and for a new trial on the grounds that the evidence affirmatively showed an illegal arrest and that appellant had been prevented from moving to suppress the evidence by the court's erroneous ruling that entrapment was a question for the jury and not one to be decided by the court as a matter of law (St. 9).

## ARGUMENT

In order for the appellant to be successful in this appeal Your Honors must be convinced that the situation here amounts to entrapment as a matter of law. In other words, the trial court must have been in error in holding that it was a question for the jury.

Unless Your Honors are so convinced there is no use of the appellant urging any other question.

The situation in this case is without any definite precedent. The writer has been unable to find any entrapment case where the government took seized narcotics from the Federal Building and attempted to peddle them in a Federal car to a known addict!!! Appellant contends *that it is the duty of the Federal Narcotic Officers to protect the addict against his own weakness.*

Your Honors will find most of the leading cases on entrapment in the annotation 66 A.L.R. at p. 500. Also see 18 A.L.R. 178. In all of these cases the government was seeking to apprehend a *peddler* and used an *addict* for the purpose of trying to catch peddler. These cases have all laid down the doctrine that if a criminal idea *originates in the defendant's own mind* that then the acts of the Federal officers seeking to obtain evidence against such a defendant would not be entrapment. This seems to be the test generally laid down. If Your Honors wish to apply *that* test to the facts of *this* case then this appellant is out of court and the judgment should be affirmed. However, we submit to Your Honors that *every* narcotic addict will take narcotics if they are solicited to do so. If this procedure is legal there will be no difficulty to convict every addict. The addict is a sick person and incapable of resisting this temptation. This fact is a medically known fact that has been recognized by all decisions. If we can take *seized* narcotics *from a Federal Building* and offer them to an addict and then convict such a sick person for yielding to the temptation placed in his way *by the government* then the judgment in this case should be affirmed and the procedure definitely legalized!

Possibly it is a good idea to lock every narcotic addict up. This procedure sets up a new and absolutely sure method of doing so. No addict will ever turn down a chance to purchase! True, sometimes the addict might be temporarily out of funds. This should make very little difference because the Narcotic Inspector can take a promissory note and the addict will still be equally guilty. The government will not be out anything on such a transaction even if the note cannot be collected because they will immediately seize the narcotics back and send it out to tempt another addict to make a purchase.

The government may with some force urge in this case that if the uncorroborated testimony of the Chinese is true there had been a previous negotiation and that therefore the government was just cooperating in seeing that such negotiation was not interrupted. There is some evidence from which this might be found although the writer believes it is incredible if a careful examination is given to the entire record.

However, conceding that this fact is true for the purpose of this argument, the appellant submits that upon the *arrest* of the Chinese and the *seizure* of the narcotics by the Federal officers and their deposit in the Federal Building in Seattle that *then, if* there had been any conspiracy, such conspiracy was *terminated.* Anything from then on was a new conspiracy instigated and promoted by the Federal officers carried out by the use of a Federal automobile. Let us suppose a narcotic addict had conspired to get some narcotics to satisfy his or her craving. Let us suppose that this failed because of the arrest of the peddler. This being the case, does it justify the Federal officers in sending seized narcotics out of the Court House and endeavoring to tempt an addict into a purchase? The appellant

considers that any evidence of a previous attempt to purchase is immaterial. Every addict would purchase if he could!

In considering this evidence some thought might be given to the fact that this is a pure revenue measure. The Federal Government has no right to regulate public morals. Any crime of the appellant would consist of not placing the proper stamp tax on the narcotics about to be purchased. The fact that the narcotics were not placed in a tax paid package in this particular case seems to the writer to be somewhat the fault of the Federal officers. They, above all, should be careful to not defraud the government. If they were taking seized narcotics out of the Court House to put in commerce it was their duty to pay the two or three cents necessary and to affix the stamps to the package before it left the Court House.

The case of *U. S. vs. Phelps,* 16 Philippine 440, is the only case even partially in point. In this case the appellant had been convicted of possession of smoking opium. He had been persuaded to smoke the opium and was furnished with the opium by a government informer. The appellate court held as a matter of law that the conviction could not stand by reason of the fact that it was entrapment.

Appellant believes that the record was properly protected under all the peculiar circumstances of this case. If Your Honors disagree we call your attention to the case of *Paine et al vs. U. S.* (*C.C.A.* 9) 7 Fed. (2nd) 263. Under the doctrine of this case any manifest error that appears affirmatively from the record justifies a reversal even though proper motions were not made at exactly the correct time. Here it affirmatively appears that this arrest was illegal as a matter of law; that if the court had so held then appellant

would have been able to suppress the evidence as to the count of which she was convicted. Appellant believes that the record shows that her fundamental rights as a citizen were violated by this arrest and by the subsequent search and seizure; that the record shows no legally obtained evidence upon which she should be convicted.

The writer believes that almost any steps are justifiable for the purpose of putting a narcotic *peddler* out of business. On the other hand also any steps are justified in trying to protect a narcotic addict from his own weakness. The writer believes that Your Honors should treat this case as an opportunity to establish a precedent that the United States Government frowns upon a policy of tempting an addict to purchase narcotics put in circulation by the Federal officers themselves.

Respectfully submitted,

HENRY CLAY AGNEW,
*Counsel for Appellant.*